Supreme Court, U.S.
FILED

09-923 FEB 1 - 2010

OFFICE OF THE CLERK

CORRECTED COPY

No.

In the Supreme Court of the United States

MAHER ARAR,
PETITIONER

v.

JOHN ASHCROFT, FORMER ATTORNEY GENERAL OF THE UNITED STATES, ET AL.,
RESPONDENTS

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI WITH APPENDIX

DAVID D. COLE
c/o Georgetown Univ. Law Center
600 New Jersey Ave. NW
Washington, DC 20001
(202) 662-9078

MARIA C. LAHOOD
Counsel of Record
JULES LOBEL
KATHERINE GALLAGHER
Center for Constitutional Rights
666 Broadway, 7th floor
New York, NY 10012
(212) 614-6430
mlahood@ccrjustice.org

Counsel for Petitioner Maher Arar

QUESTIONS PRESENTED

1. Whether federal officials who conspired with Syrian officials to subject an individual in U.S. custody in the United States to torture in Syria may be sued for damages, particularly where the federal officials also intentionally obstructed the victim's access to the judicial remedy provided by Congress to prevent torture, and damages are the only remedy available to vindicate the victim's rights.

2. Whether the court of appeals erred in dismissing petitioner's claim under the Torture Victim Protection Act, 28 U.S.C. § 1350 note, by concluding, in conflict with decisions of this Court and several courts of appeals, that willful participation in joint action with government officials is insufficient to constitute action under "color of law" of that jurisdiction, where defendants are alleged to have conspired with Syrian officials to have petitioner tortured in Syria, delivered him to his torturers, provided them with questions to ask him, and obtained the answers tortured out of him.

3. Whether the court of appeals erred in dismissing petitioner's *Bivens* claim for obstruction of access to court on the ground that he did not sufficiently identify the particular defendants who took part in blocking his access to court, where petitioner identified a series of concrete steps taken to keep him from court, specifically identified each individual defendants' role in the larger conspiracy, was detained during the relevant events and therefore could not identify the defendants' identities more particularly, and had no opportunity to pursue discovery.

PARTIES TO THE PROCEEDINGS

Petitioner:

Maher Arar was plaintiff in the district court and appellant in the court of appeals, and is petitioner in this Court.

Respondents:

The following parties were defendants in their individual capacities in the district court and appellees in the court of appeals, and are respondents in this Court:

John Ashcroft, former Attorney General of the United States;

Larry D. Thompson, former Deputy Attorney General;

J. Scott Blackman, former Regional Director of the Regional Office of Immigration and Naturalization Services;

Edward J. McElroy, former District Director of Immigration and Naturalization Services for the New York District;

Robert Mueller, Director of the Federal Bureau of Investigation;

James W. Ziglar, former Commissioner for Immigration and Naturalization Services, United States; and

John Doe 1-10, Federal Bureau of Investigation and/or Immigration and Naturalization Service Agents.

The following parties were defendants in their official capacities in the district court and appellees in the court of appeals, but petitioner is not seeking review of his claim for injunctive and declaratory relief:

John Ashcroft, Attorney General of the United States;

Tom Ridge, Secretary of Homeland Security;

Robert Mueller, Director of the Federal Bureau of Investigation John Ashcroft, former Attorney General of the United States; and

Paula Corrigan, Regional Director of Immigration and Customs Enforcement.

Amici Curiae:

The following *Amici Curiae* presented their views to the Court of Appeals Panel in support of Maher Arar:

Retired Federal Judges: the Honorable John J. Gibbons, the Honorable Shirley M. Hufstedler, the Honorable Nathaniel R. Jones, the Honorable Timothy K. Lewis, the Honorable H. Lee Sarokin, the Honorable William S. Sessions, and the Honorable Patricia M. Wald;

United States and Canadian Scholars: Payam Akhavan, Janet Cooper Alexander, Erwin Che-

merinsky, Irwin Cotler, Norman Dorsen, Thomas A. Eaton, David M. Golove, Helen Hershkoff, Patrick Monahan, Trevor W. Morrison, Sheldon H. Nahmod, Bruce Ryder, David Shapiro, and Michael L. Wells;

The Center for Justice and Accountability, International Federation for Human Rights, Minnesota Advocates for Human Rights, World Organization Against Torture, David M. Crane, Scott Horton, Michael P. Scharf, Leila Nadya Sadat, and David Weissbrodt; and

The Center for International Human Rights of Northwestern University School of Law.

The following *Amici* presented their views to the Court of Appeals on Rehearing *en banc* in support of Maher Arar:

Retired Federal Judges: the Honorable John J. Gibbons, the Honorable Shirley M. Hufstedler, the Honorable Nathaniel R. Jones, the Honorable Timothy K. Lewis, the Honorable H. Lee Sarokin, the Honorable William S. Sessions, and the Honorable Patricia M. Wald;

Professors of Law: Norman Dorsen, Helen Hershkoff, Frank Michelman, Burt Neuborne, and David Shapiro;

Law professors Janet Cooper Alexander, Erwin Chemerinsky, Thomas A. Eaton, Amanda Frost, Martha L. Minow, Jeremiah Smith, Sheldon H. Nahmod, Edward A. Purcell, Jr., Michel Rosen-

feld, Carl Tobias, Laurence H. Tribe, William Van Alstyne, and Steven Vladeck;

The American Civil Liberties Union and the New York Civil Liberties Union;

The NAACP Legal Defense & Educational Fund, Inc.; and

The Redress Trust ("REDRESS").

CORPORATE DISCLOSURE STATEMENT

There is no parent or publicly held company owning 10% or more of a corporation's stock the disclosure of which is required under Rule 29.6.

TABLE OF CONTENTS

Table of Authorities xi

Petition for Writ of Certiorari 1

Opinions Below 1

Jurisdiction 1

Constitutional and Statutory Provisions Involved 1

Statement 2

Reasons for Granting the Petition 11

I. The Court of Appeals' Decision Raises Issues of National Importance by Precluding a *Bivens* Remedy Where Federal Defendants Obstructed Petitioner's Access to the Specific Remedy Provided by Congress. 11

II. The Court of Appeals' Decision Adopted an Unprecedented and Virtually Irrebuttable Presumption against *Bivens* Actions, in Conflict with Decisions of This Court and the Courts of Appeals. 15

III. The Court of Appeals' Holding that Defendants Did Not Act Under "Color of Law" of a Foreign Nation When They Conspired With Syrian Officials Conflicts With Decisions of This Court and the Eleventh Circuit. 26

IV. The Dismissal of Petitioners' Access to Court Claim for Failure to Identify the Particular Defendants Responsible for Blocking his Access to Court Conflicts with Decisions of This Court and Other Courts Of Appeals. 30

Conclusion 35

APPENDICES

Appendix A (Opinion of the United States Court of Appeals for the Second Circuit sitting *en banc*, Nov. 2, 2009) 1a

Majority Opinion 5a

Dissenting Opinion of Judge Sack 54a

Dissenting Opinion of Judge Parker 125a

Dissenting Opinion of Judge Pooler 157a

Dissenting Opinion of Judge Calabresi...173a

Appendix B (Opinion of the United States Court of Appeals for the Second Circuit, Jun. 30, 2008).....195a

Majority Opinion.....200a

Dissenting Opinion of Judge Sack.....276a

Appendix C (Opinion of the United States District Court for the Eastern District of New York, Feb. 16, 2006).....335a

Appendix D (Torture Victim Protection Act of 1991, Public Law 102-256 Stat 73, 28 USC § 1350).....427a

Appendix E (Excerpts of the Foreign Affairs Reform and Restructuring Act of 1998, Public Law 111-125, 8 USCS § 1231 .....431a

Appendix F (Excerpts of the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment).....434a

Appendix G (Complaint with Exhibits) 438a

Complaint.....438a

EXHIBIT A: Syria – Country Reports on Human Rights 2002: Dated March 31, 2003.....473a

EXHIBIT B: Remarks by the President, November 6 2003.....527a

EXHIBIT C: Various News Articles.....544a

EXHIBIT D: Final Notice of Inadmissibility (Oct. 7, 2002).....581a

EXHIBIT E: Transcript of CBS News Sixty Minutes II "His Year in Hell".....591a

TABLE OF AUTHORITIES

CASES

Aldana v. Del Monte Fresh Produce,
416 F.3d 1242 (11th Cir. 2005) 10, 28

Al-Kidd v. Ashcroft,
580 F.3d 949 (9th Cir. 2009) 24

Amir v. Gonzales,
467 F.3d 921(6th Cir. 2006) 12

Arar v. Ashcroft,
585 F.3d 559 (2d Cir. 2009).....*passim*

Arar v. Ashcroft,
532 F.3d 157 (2d Cir. 2008).....1, 8, 33

Arar v. Ashcroft,
414 F. Supp. 2d 250 (E.D.N.Y. 2006).....1, 8

Ashcroft v. Iqbal,
129 S. Ct. 1937 (2009) 4, 30, 33, 34

Bagola v. Kindt,
131 F.3d 632 (7th Cir. 1997) 17, 18

Bell Atlantic Co. v. Twombly,
550 U.S. 544 (2007) 4, 30, 33, 34

Bishop v. Tice,
622 F.2d 349 (8th Cir. 1980) 19

Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971) ..... *passim*

Boumediene v. Bush, 128 S. Ct. 2229 (2008) 14

Braden v. Wal-Mart Stores, Inc., 588 F.3d 585 (8th Cir. 2009) 34

Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n, 531 U.S. 288 (2001) 27

Brooks v. Ross, 578 F.3d 574 (7th Cir. 2009) 34

Butz v. *Economou*, 38 U.S. 478 (1978) 23

Cadet v. Bulger, 377 F.3d 1173 (11th Cir. 2004) 12

Cale v. Johnson, 861 F.2d 943 (6th Cir. 1988) 17

Carlson v. Green, 446 U.S. 14 (1980) ..... *passim*

Crowe v. County of San Diego, __ F.3d __, 2010 U.S. App. LEXIS 894 (9th Cir. Jan. 14, 2010) 28

Davis v. Passman, 442 U.S. 228 (1979) 17, 20

Dennis v. Sparks,
449 U.S. 24 (1980) 27

Gourdet v. Holder,
587 F.3d 1 (1st Cir. 2009).....12

Hamdan v. Rumsfeld,
548 U.S. 557 (2006) 14

Hampton v. Hanrahan,
600 F.2d 600 (7th Cir.1979) 29

Hamdi v. Rumsfeld,
542 U.S. 507 (2004) 14

Hindes v. F.D.I.C.,
137 F. 3d 148 (3d Cir. 1998).....28

INS v. St. Cyr,
533 U.S. 289 (2001) 12

Khouzam v. Attorney General of the United States,
549 F.3d 235 (3d Cir. 2008) 12

Magluta v. Samples,
375 F.3d 1269 (11th Cir. 2004) 17, 24

Martinez-Aguerro v. Gonzalez,
459 F.3d 618 (5th Cir. 2006) 17

Mironescu v. Costner,
480 F.3d 664 (4th Cir. 2007) 12

Mitchell v. Forsyth,
472 U.S. 511 (1985) 23

Munsell v. Dep't of Agriculture,
509 F.3d 572 (D.C. Cir. 2007).....20

Pierre v. Gonzales,
502 F.3d 109 (2d Cir. 2007).....12

Rochin v. California,
342 U.S. 165 (1952) 16

Saint Fort v. Ashcroft,
329 F.3d 191 (1st Cir.2003) 12

Singh v. Ashcroft,
351 F.3d 435 (9th Cir. 2003) 12

Smith v. United States,
561 F.3d 1090 (10th Cir. 2009) 18

Sonntag v. Dooley,
650 F.2d 904 (7th Cir. 1981) 20

Trulock v. Freeh,
275 F.3d 391 (4th Cir. 2001) 24

Wagenmann v. Adams,
829 F.2d 196 (1st Cir. 1987) 28

Wang v. Ashcroft,
320 F.3d 130 (2d Cir. 2003).....12

Wilkie v. Robbins,
551 U.S. 537 (2007) 15, 18, 19

Wilson v. Libby,
535 F.3d 697 (D.C. Cir. 2008) 18

Zheng v. Ashcroft,
332 F.3d 1186 (9th Cir. 2003) 12

STATUTES

Foreign Affairs Reform and
Restructuring Act, 8 U.S.C. § 1231 note...1, 7, 11

8 U.S.C. § 1252.....7, 11

28 U.S.C. § 1254.....1

28 U.S.C. § 1331.....1

Torture Victim Protection Act,
28 U.S.C. § 1350 note .....*passim*

INTERNATIONAL TREATIES

Convention against Torture and Other
Forms of Cruel, Inhuman and
Degrading Treatment or Punishment
1465 U.N.T.S. 85 (1994) 2, 11, 12, 19

FEDERAL RULES AND REGULATIONS

Service Upon and Action by Attorney or
Representative of Record,
8 C.F.R. § 292.5 (2002) 5

OTHER AUTHORITIES

Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar, Report of the Events Relating to Maher Arar (2006) 6, 7

Department of Homeland Security's Office of Inspector General, The Removal of a Canadian Citizen to Syria, OIC-08-18 (2008).....7, 14, 26, 32

United States Report to the Committee Against Torture (Feb. 9, 2000).....2, 16, 19

United States Written Response to Questions Asked by the United Nations Committee Against Torture (April 28, 2006).....2, 16, 19

PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the *en banc* court of appeals (App. A, 1a-194a) is reported at 585 F.3d 559. The opinion of the panel (App. B, 195a-334a) is reported at 532 F.3d 157. The opinion of the district court (App. C, 335a-426a) is reported at 414 F. Supp. 2d 250.

JURISDICTION

The district court had jurisdiction pursuant to 28 U.S.C. § 1331, as Arar's case presented federal questions. The judgment of the *en banc* court of appeals was entered on November 2, 2009. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment provides, in pertinent part: "No person shall . . . be deprived of life, liberty, or property, without due process of law." The Torture Victim Protection Act of 1991 (TVPA), Pub. L. 102-256, 106 Stat. 73 (28 U.S.C. § 1350 note), provides in pertinent part that "[a]n individual who, under actual or apparent authority, or color of law, of any foreign nation . . . subjects an individual to torture shall, in a civil action, be liable for damages to that individual." The TVPA is reproduced at App. D, 427a-430a. The Foreign Affairs Reform and Restructuring Act of 1998, Pub. L. 105-277, § 2242, codified at 112 Stat. 2681, 822-23 (8 U.S.C. § 1231 note), is reproduced at App. E,

431a-433a. Relevant portions of the Convention Against Torture and Other Forms of Cruel, Inhuman and Degrading Treatment or Punishment (CAT), *opened for signature* Dec. 10, 1984, S. Treaty Doc. No. 100-20 (1988), 1465 U.N.T.S. 85 (entered into force June 26, 1987), are reproduced at App. E, 434a-437a.

STATEMENT

1. This petition seeks review of a 7-4 *en banc* decision of the Second Circuit, affirming the dismissal on the pleadings of a suit brought by petitioner Maher Arar, a Canadian citizen, which sought damages from federal officials for delivering him from their custody in the United States to Syria for purposes of subjecting him to torture and arbitrary detention. The majority's legal reasoning and result, which left Arar without any remedy for his claims, and are contrary to the State Department's representation that *Bivens* actions provide remedies for torture by federal officials,[1] were so controversial that they inspired four dissenting opinions spanning 124 pages. App. A, 54a-194a.

The core allegations of the complaint were summarized by Judge Parker in his dissent, joined in by each of the other dissenting judges:

---

[1] U.S. DEP'T OF STATE, U.S. DEP'T OF STATE, UNITED STATES WRITTEN RESPONSE TO QUESTIONS ASKED BY THE UNITED NATIONS COMMITTEE AGAINST TORTURE 10 (bullet-point 5) (April 28, 2006), *available at* http://www.state.gov/documents/organization/68662.pdf; U.S. Dep't of State, United States Report to the Committee Against Torture, ¶ 51 (bullet-point 5), U.N. Doc. CAT/C/28/Add.5 (Feb. 9, 2000), *available at* http://www.state.gov/documents/organization/100296.pdf.

> Maher Arar credibly alleges that United States officials conspired to ship him from American soil, where the Constitution and our laws apply, to Syria, where they do not, so that Syrian agents could torture him at federal officials' direction and behest. He also credibly alleges that, to accomplish this unlawful objective, agents of our government actively obstructed his access to this very Court and the protections established by Congress.

App. A, 125a (citation omitted). In Judge Parker's view, the majority decision "distorts the system of checks and balances essential to the rule of law, and it trivializes the judiciary's role in these arenas." App. A, 126a.

The Second Circuit decision warrants this Court's review for three reasons. First, the *en banc* majority radically departed from this Court's *Bivens* jurisprudence, erecting an unprecedented and near-insurmountable barrier against *Bivens* relief by expressly refusing to consider any factors in favor of a *Bivens* action, and holding that *any* reason for hesitation compels dismissal. It did so, moreover, in a case where defendants are alleged not only to have subjected Arar to torture, but to have denied him access to the judicial relief that Congress guaranteed him to prevent him being sent to torture.

Second, the court misinterpreted the Torture Victim Protection Act to deny relief even where federal officials are alleged to have conspired with foreign officials to subject Arar to torture under "color of law" of a

foreign nation. That conclusion conflicts with decisions of this Court and other courts holding that "willful participation in joint action" is sufficient to constitute action "under color of law."

Third, the court imposed unwarranted and impermissible pleading requirements, contrary to this Court's recent decisions in *Bell Atlantic Co. v. Twombly*, 550 U.S. 544 (2007), and *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009), in upholding dismissal of Arar's access to court claim for failure to specifically identify the particular defendants who obstructed such access.

2. Defendant federal officials intercepted petitioner in September 2002, while he was changing planes at John F. Kennedy International Airport on his way home to Canada. Erroneously suspecting that he might be associated with terrorists or terrorist organizations, they detained him in New York for 13 days, and ultimately decided to remove him, not to Canada—his country of citizenship, residence, and destination—but to Syria, a country that the State Department criticizes annually for its systematic use of torture as an interrogation tactic.[2] Defendants sent Arar to Syria, the complaint alleges, so that Syrian officials could detain him indefinitely without charge and interrogate him using torture. App. G, 441a.

To ensure that a court would not interfere with their illegal plan, defendants conspired to obstruct Arar's ability to obtain the judicial protection Congress

---

[2] Arar was born in Syria, and therefore is a dual national. But he moved to Canada with his family when he was a teenager, and has lived in Canada ever since. He objected at every turn to being sent to Syria, asserting that he would be tortured there.

provided to ensure that individuals not be sent to countries where they face a risk of torture. They initially denied Arar's repeated requests for counsel and even to make a phone call. App. G, 452a-455a. When he was finally able to meet with a lawyer—ten days after he was detained—defendants hastily scheduled an extraordinary six-hour proceeding the very next day—*starting at 9 PM on a Sunday evening*—ostensibly to examine whether he had a credible fear of torture in Syria. App. G, 456a-457a.

At that proceeding, which was closely coordinated with officials in Washington, D.C., (App. G, 460a; App. A, 140a-141a), defendants falsely told Arar that his lawyer had chosen not to participate. In fact, the only "notice" provided Arar's lawyer was a message left on her office voicemail that Sunday evening by defendant McElroy. App. G, 456a. Immediately upon getting the message Monday morning, Arar's attorney called the Immigration and Naturalization Service, who lied to her, claiming that Arar was in route to New Jersey. App. G, 456a-457a. In reality, Arar remained in New York until about 4:00 a.m. Tuesday morning, when he was taken out of his cell in chains and shackles, served with his "Final Notice of Inadmissibility," a prerequisite to a petition for review in federal court, and secretly transported out of the country on a federally chartered jet. App. G, 458a; App. G, Ex. D, 581a-590a. Defendants never served the order on Arar's lawyer, as required by 8 C.F.R. § 292.5(a) (2002), and never informed her that Arar had been removed to Syria. App. G, 462a.

Upon delivering Arar to Syria, defendants provided Syrian security officials with a dossier on Arar and

questions to ask him. App. G, 460a. Syrian officials tortured Arar while asking him questions strikingly similar to those federal agents had asked him in New York, and detained him without charge for nearly a year, most of that time in a dark damp underground cell the size of a grave, three feet by six feet by seven feet. App. G, 459a-461a. Defendants obtained from the Syrians the answers they extracted from Arar by torture. App. G, 460a.

After a year, Syrian officials released Arar, finding no connection to terrorism or evidence of wrongdoing. App. G, 463a. He returned to Canada, which convened a commission to conduct a public investigation into Canadian officials' conduct related to Arar's case. The Commission Report fully exonerated Arar, and found that Canadian officials provided false information about him to U.S. officials, but that the Canadians were not complicit in the U.S. officials' delivery of Arar to Syria.[3] The Canadian Parliament unanimously apologized to Arar, as did the Prime Minister, and the Canadian government paid him 10.5 million dollars (Canadian) for its part in his ordeal. App. A, 73a.

---

[3] *See* COMMISSION OF INQUIRY INTO THE ACTIONS OF CANADIAN OFFICIALS IN RELATION TO MAHER ARAR, REPORT OF THE EVENTS RELATING TO MAHER ARAR (2006), *available at* http://epe.lac-bac.gc.ca/100/206/301/pco-bcp/commissions/maher_arar/07-09-13/www.ararcommission.ca/eng/26.htm (last visited Jan. 31, 2010); *see also*, Addendum to the Report (Aug. 9, 2007), which released previously redacted portions of the Report, and is available on the same site. The court of appeals took judicial notice of the existence of the three-volume Report and its Addendum, as well as the scope of their contents, but not the facts asserted therein. App. A, 71a-72a.

3. Shortly after his release, Arar filed this lawsuit against the U.S. federal officials responsible for sending him to Syria. Arar alleged that the federal officials sent him to Syria because, unlike Canada, Syria had a known practice of torturing its detainees, and further alleged that defendants conspired with the Syrians to subject Arar to torture. App. G, 460a-461a; *see also* App. G, Ex. A, 477a-480a. He also alleged that defendants conspired to keep him away from a court while he was detained to ensure that their illegal plan could not be frustrated. App. G, 441, 452a-458a. Most of Arar's allegations have since been confirmed by the Canadian Commission of Inquiry, and by the Department of Homeland Security's Inspector General.[4]

Had Arar not been illegally precluded from seeking judicial relief while in U.S. custody, a federal court could—and almost certainly would—have barred his removal, because there were substantial grounds to believe he would be tortured if delivered to Syria security officials. 8 U.S.C. § 1231 note; 8 U.S.C. §1252(a). Having been denied that opportunity by defendants, Arar sued for the only relief still available to him: (1) damages for violation of his rights under the Fifth Amendment and the TVPA; and (2) declaratory and injunctive relief invalidating his illegal removal order and lifting the bar on his reentry to the United States.

---

[4] *See* DEP'T. OF HOMELAND SECURITY'S OFFICE OF INSPECTOR GENERAL, THE REMOVAL OF A CANADIAN CITIZEN TO SYRIA, OIC-08-18 (March 2008, publicly released June 5, 2008), *available at* http://www.dhs.gov/xoig/assets/mgmtrpts/OIGr_08-18_Jun08.pdf (last visited Jan. 31, 2010) ("OIG Report"). The court of appeals took judicial notice of the existence of the unclassified OIG report and the scope of its contents.

In 2006, the district court dismissed Arar's *Bivens* claim for torture on the ground that "special factors" relating to national security and foreign policy foreclosed any such relief. App. C, 408a-414a. It also dismissed Arar's TVPA claim, holding that, in delivering Arar to Syrian officials and conspiring to have him tortured there, the federal defendants were acting under color of federal law and therefore could not be acting under color of foreign law. App. C, 367a-372a.

The court also dismissed Arar's claim that he had been denied access to court for failure to plead sufficient facts. App. C, 415a-421a. It permitted Arar to replead, but required that he do so *without reference to his removal to Syria*—even though it was precisely his right to seek judicial protection from that removal that Arar alleged defendants had obstructed.

4. In 2008, the court of appeals affirmed, initially by a 2-1 panel opinion. App. B, 195a-334a. Shortly thereafter, the court *sua sponte* granted *en banc* review. On November 2, 2009, the *en banc* court also affirmed, by a vote of 7-4. App. A, 1a-194a. The majority ruled that federal courts deciding whether to recognize a *Bivens* action should consider only factors *against* recognizing such a claim, and that even the slightest cause for hesitation requires dismissal. App. A, 31a-32a. Applying that one-sided test, the majority concluded that because Arar had sued high-level federal officials, because his suit might require the consideration of confidential information, and because his claims implicated foreign affairs and national security, it should be dismissed at the threshold. App. A, 33a-42a.

The majority held that Arar's TVPA claim failed because his allegations that the federal defendants had conspired with the Syrians to subject him to torture in Syria, delivered him there, and provided questions for and obtained answers from his torture, were insufficient to establish that they had acted under "color of law" of a foreign nation, as required by the TVPA. The court reasoned that unless the federal defendants were alleged to have directly exercised Syrian authority themselves, they could not be held liable. App. A, 18a.

The majority also held that Arar's claim for denial of access to court was insufficiently pleaded because he was unable to identify precisely which officials had blocked him from seeing an attorney and being able to seek judicial review. App. A, 21a.[5]

Four judges dissented in four separate opinions, with each dissenting judge joining the other dissents in full. Finding that this case did not present a "new context," Judge Sack maintained that the majority had artificially and improperly divided Arar's claim for relief, which alleged a continuing constitutional violation consisting of apprehension, detention, interrogation, denial of access to the courts, and delivering him to Syria to be tortured and arbitrarily detained. App. A,

---

[5] The *en banc* majority also egregiously misstated critical facts. It stated that Canada was unwilling to accept Arar's return, App. A, 48a, when the record established precisely the opposite—Canada had told U.S. authorities that it would admit Arar—as expressly addressed at oral argument, and again in a post-decision letter notifying the court of appeals of its error. Letter from David Cole, counsel for Maher Arar, to Catherine O'Hagan Wolfe, Clerk of the Court (Nov. 24, 2009) (on file with the Second Circuit). Yet the court never corrected its erroneous statement, which it offered as a way of "explaining" the government's actions.

89a. He reasoned that had defendants tortured Arar themselves in New York, a *Bivens* action would plainly lie, and that the fact that defendants chose to "outsource" the torture elsewhere should not warrant a different result. App. A, 96a-97a; 106a-107a.

As noted above, Judge Parker argued that *Bivens* relief was especially appropriate because federal officials affirmatively blocked Arar's access to a congressionally-mandated judicial remedy, deliberately circumventing the checks and balances Congress established. App. A, 128a. He found that to deny a remedy in this case "would immunize official misconduct." App. A, 126a.

Judge Pooler reasoned that under Section 1983 jurisprudence, which Congress instructed the courts to follow in construing the TVPA, willful participation in joint action with a foreign government official's illegal actions is sufficient to constitute action under color of law. App. A, 171a. She specifically noted that the majority's conclusion to the contrary conflicts with this Court's Section 1983 jurisprudence and the Eleventh Circuit's decision construing the TVPA in *Aldana v. Del Monte Fresh Produce*, 416 F.3d 1242, 1249, 1255 (11th Cir. 2005). App. A, 171a.

Judge Calabresi warned that "when the history of this distinguished court is written, today's majority decision will be viewed with dismay." App. A, 173a. He argued that the majority's concerns about treatment of confidential information should be addressed through invocation and assessment of the state secrets privilege, and not by closing the door on Arar's claims

based on speculation about potential secrecy issues. App. A, 185a.

REASONS FOR GRANTING THE PETITION

I. The Court of Appeals' Decision Raises Issues of National Importance by Precluding a *Bivens* Remedy Where Federal Defendants Obstructed Petitioner's Access to the Specific Remedy Provided by Congress.

The court of appeals concluded that Arar's claim that federal defendants violated his constitutional rights by sending him to Syria to be tortured could not support a *Bivens* claim because it would raise issues regarding national security, foreign policy, and confidential information. But the court failed to acknowledge that all of the same issues would have been present had defendants not obstructed Arar from seeking court review of his removal order while in the United States, as Congress contemplated. Implementing a treaty signed by the President and ratified by the Senate, the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), Congress has directed that no alien should be removed to a country where he or she faces a substantial risk of torture, and has provided for judicial review of removal decisions to ensure enforcement of that guarantee. App. E, 431a-433a, 8 U.S.C. § 1231 (a) and (e) (prohibiting sending any person to a country where he faces danger of torture); 8 U.S.C. §§ 1252(a)(2)(D), (a)(4) (granting court of appeals jurisdiction to review constitutional and CAT claims in petitions for review of removal orders). Courts routinely review removal decisions involving claims that aliens

would face a risk of torture if removed, even where foreign policy or national security issues are present.[6] Arar's claim for damages raises no issues of foreign policy, national security, or classified information that would not have been present had he been able to invoke the judicial review Congress provided.

The court of appeals' decision therefore has the sweeping consequence of disabling the *Bivens* remedy as a deterrent against federal officials who circumvent the finely wrought checks and balances that Congress

---

[6] *See, e.g., Khouzam v. Attorney General of the United States*, 549 F.3d 235 (3d Cir. 2008) (neither foreign relations concerns nor the non-inquiry doctrine precluded the court from reviewing a removal order under CAT); *Pierre v. Gonzales*, 502 F.3d 109, 116 (2d Cir. 2007) (reviewing CAT claim on petition for review of removal order); *Gourdet v. Holder*, 587 F.3d 1, 5-7 (1st Cir. 2009) (same); *Amir v. Gonzales*, 467 F.3d 921, 926-27 (6th Cir. 2006) (same); *Zheng v. Ashcroft*, 332 F.3d 1186, 1188-89, 1194-96 (9th Cir. 2003) (same); *cf. Mironescu v. Costner*, 480 F.3d 664, 672-73 (4th Cir. 2007) (neither foreign policy implications nor confidential communications with other nations bar judicial consideration of a habeas action questioning whether extradition to another country would violate CAT).

In addition, aliens held for removal proceedings may invoke federal court review via habeas corpus in appropriate circumstances, *see Cadet v. Bulger*, 377 F.3d 1173, 1181-83 (11th Cir. 2004) (habeas jurisdiction includes review of CAT claims in appropriate circumstances); *Singh v. Ashcroft*, 351 F.3d 435, 441 (9th Cir. 2003) (same); *Wang v. Ashcroft*, 320 F.3d 130, 140-42 (2d Cir. 2003) (same); *Saint Fort v. Ashcroft*, 329 F.3d 191, 200-02 (1st Cir. 2003). That avenue would also have been available to Arar had defendants allowed him access to court. *See INS v. St. Cyr*, 533 U.S. 289 (2001); *see also* App. A, 83a (quoting U.S. government at *en banc* oral argument stating Second Circuit precedent "'shows that in extraordinary cases, and no one can dispute that this is an extraordinary case, the plaintiff could have filed a habeas [petition] and sought a stay pursuant to the All Writs Act.'").

established to protect against sending aliens to countries where they face a risk of torture. It effectively permits executive officials to unilaterally preclude congressionally guaranteed judicial review by ensuring that an alien in their custody cannot get access to a lawyer or court. Congress plainly considered some judicial review appropriate. By denying all judicial review in a situation where defendants blocked the review Congress provided, the court of appeals undermined the clear intent of Congress and effectively allowed the Executive to manipulate the jurisdiction of the courts.

As this Court has stated, one of the predominant justifications for *Bivens* remedies is to deter unconstitutional conduct. *Carlson v. Green*, 446 U.S. 14, 21 (1980) ("the *Bivens* remedy, in addition to compensating victims, serves a deterrent purpose"); *Correctional Servs. Corp. v. Malesko*, 534 U.S. 61, 70 (2001) ("The purpose of *Bivens* is to deter individual federal officers from committing constitutional violations"). Here, the availability of a *Bivens* remedy would play a crucial deterrent role in assuring that the system created by Congress to protect aliens from subjection to torture—including its provision of judicial review—cannot be circumvented. The court of appeals' decision permits executive officials to escape all accountability so long as they ensure that aliens in their custody cannot get to court.

Moreover, defendants are not merely alleged to have sent Arar to Syria *despite* the risk of torture. They are alleged to have sent him to Syria *for the purpose of* having him tortured—in the hopes of extracting

information from him.[7] To immunize federal defendants from any judicial review under these circumstances is to countenance not only a subversion of our system of checks and balances, but torture itself, and on these grounds alone warrants this Court's review—even apart from the conflicts discussed below that the Second Circuit's decision created with decisions of this Court and other courts of appeals.

This Court has made clear that Congress and the courts have important roles to play in ensuring that our commitment to the rule of law is not overborne by concerns of national security. *Boumediene v. Bush*, 128 S. Ct. 2229 (2008); *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006); *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004). In this instance, Congress has expressly directed the courts to protect the fundamental human rights guarantee against torture, yet executive officials intentionally subverted both that guarantee and the

---

[7] DHS Inspector General Skinner testified that he could not rule out the possibility that Arar was sent to Syria because federal officials wanted him interrogated "under conditions that our law would not permit." *U.S. Department of Homeland Security Inspector General Report OIG-08-18, 'The Removal of a Canadian Citizen to Syria,' Joint Hearing Before the Subcomm. on the Constitution, Civil Rights, and Civil Liberties of the Comm. on the Judiciary and the Subcomm. on Int'l Organizations, Human Rights, and Oversight of the Comm. on Foreign Affairs of the House of Representatives*, 110th Congress 53 (2008) (oral testimony of Richard L. Skinner, Office of the Inspector General, U.S. Dept. of Homeland Security, *available at* http://judiciary.house.gov/hearings/printers/110th/42724.PDF "Testimony of IG Skinner"). Although the "INS concluded that Arar was entitled to protection from torture and that returning him to Syria would more likely than not result in his torture", (OIG Report, at 22), that decision was "ultimately overridden." Testimony of IG Skinner at 56.

judicial review process Congress established. In these circumstances, a *Bivens* action is not only appropriate, but necessary, to reaffirm the checks and balances that Congress sought to ensure.

II. The Court of Appeals' Decision Adopted an Unprecedented and Virtually Irrebuttable Presumption against *Bivens* Actions, in Conflict with Decisions of This Court and the Courts of Appeals.

The court of appeals' decision departs radically from the *Bivens* jurisprudence of this Court and the lower federal courts, imposing an unprecedented and virtually insurmountable presumption against *Bivens* actions, in direct contravention of this Court's most recent *Bivens* decision, *Wilkie v. Robbins*, 551 U.S. 537 (2007), and decisions of several courts of appeals. This Court in *Wilkie* held that the decision whether to recognize a *Bivens* action is an exercise of federal common law requiring careful weighing of factors for and against a damages remedy in the particular circumstances. The court of appeals, however, ruled that it must close its eyes to any factors *in favor of* recognizing an action, and could consider only factors that counseled *against* recognizing such an action. It further held that *any* reason for hesitation should conclusively bar the door to such claims. That artificially one-sided, hair-trigger approach has never been adopted by any other court, and is directly contrary to *Wilkie*'s directive that courts weigh all considerations both for and against recognition of a *Bivens* remedy.

There is no dispute that torture "shocks the conscience" and violates the Fifth Amendment. *Rochin v.*

California, 342 U.S. 165 (1952). *Bivens* actions for physical abuse of prisoners in U.S. custody are also well-established. *Carlson v. Green*, 446 U.S. 14. Thus, as Judge Sack noted, there could be no question that a *Bivens* action would lie had defendants tortured Arar themselves while he was detained in New York. App. 91a-97a. Indeed, the United States itself has affirmatively represented that a *Bivens* action is available to hold federal officials accountable for torture.[8] That defendants decided to torture Arar by sending him elsewhere does not change that fundamental principle.

1. The Court's Interpretation of the "Special Factors" Inquiry Conflicts with Decisions of This Court and the Courts of Appeals.

By holding that it could not even *consider* any factors favoring a *Bivens* remedy, and creating a hair-trigger test barring *Bivens* relief if there is any reason to hesitate whatsoever, the court of appeals' decision contravenes this Court's jurisprudence and conflicts with decision of other courts of appeals.

This Court in *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), held that where federal officials violate an individual's constitutional rights, federal courts may grant relief in the form of damages as a deterrent to unconstitutional behavior and as a remedy for constitutional injury. As Justice Harlan explained, just as federal courts may grant injunctive relief where federal officials violate an individual's constitutional rights—

---

[8] *See* note 1, *supra*.

despite the absence of an express provision in the Constitution for such a remedy—so the Court may, in appropriate cases, grant monetary relief. *Id.* at 404-05 (Harlan, J., concurring). The Court noted, however, that where Congress has expressly established an adequate alternative remedial scheme, or when "special factors counseling hesitation" are present, the Court should stay its hand and decline to recognize an action for damages. *Id.* at 396.

Since *Bivens*, this Court has held that damages relief can be afforded against members of Congress for employment discrimination—even where Congress chose *not* to make its own members liable—and against prison officials for abusive treatment of prisoners—despite the Court's traditional deference to concerns of prison security and administration. *Davis v. Passman*, 442 U.S. 228 (1979); *Carlson v. Green*, 446 U.S. 14. Lower courts have also held that *Bivens* actions lie to remedy abusive treatment of detainees held in custody by U.S. officials.[9]

The court here reached a contrary result by transforming the "special factors counseling hesitation" inquiry into a near-insurmountable presumption against *Bivens* relief. It took what this Court established as a ("special") *exception* to relief, and turned it into the ordinary rule, from which cases recognizing *Bivens* relief would become the exceedingly rare exception. It achieved this result in two ways, both unprecedented.

---

[9] *See, e.g., Martinez-Aguerro v. Gonzalez*, 459 F.3d 618 (5th Cir. 2006); *Cale v. Johnson*, 861 F.2d 943 (6th Cir. 1988); *Bagola v. Kindt*, 131 F.3d 632 (7th Cir. 1997); *Magluta v. Samples*, 375 F.3d 1269 (11th Cir. 2004).

First, the court of appeals held that in determining whether to recognize a *Bivens* cause of action, the court should consider only factors counseling *against* recognizing a *Bivens* action, and insisted that "no account is taken of countervailing factors that might counsel" in *favor* of a *Bivens* remedy. App. A, 32a.. This artificially skewed approach is directly contrary to this Court's directive in *Wilkie v. Robbins*, 551 U.S. at 554, that courts must "weigh[] reasons *for and against* the creation of a new cause of action, the way common law judges have always done." (emphasis added); *id.* (courts must consider the "competing arguments" for and against recognizing a *Bivens* action).

The *en banc* majority's approach also conflicts with that of other circuits, which have similarly recognized that courts must weigh factors *for* as well as *against* such relief. *See Bagola v. Kindt*, 131 F.3d 632, 643 (7th Cir. 1997) (recognizing *Bivens* action for prison abuse, in light of "the deterrence factor identified in *Carlson*, as well as the recognized necessity to provide *some* forum for a prisoner's constitutional claims"); *see also Smith v. United States*, 561 F.3d 1090, 1103 (10th Cir. 2009) (same). Similarly, the D.C. Circuit has explicitly recognized that consideration of factors for and against *Bivens* relief is mandated. *Wilson v. Libby*, 535 F.3d 697, 710 (D.C. Cir. 2008) ("[t]he decision of whether to create a *Bivens* remedy involves our judgment and 'weighing [of] reasons for and against the creation of a new cause of action, the way common law judges have always done.'") (quoting *Wilkie v. Robbins*, 551 U.S. at 554) (alterations in original).

Considering only factors counseling against *Bivens* relief, and artificially closing one's eyes to any fac-

tors in favor of such relief, is contrary to the very premise of *Bivens* itself. As this Court reiterated in *Wilkie*, the decision whether to grant damages for federal officials' constitutional violations is an exercise of federal common law, a function whose very nature requires courts to weigh all relevant considerations in reaching its result. 551 U.S. at 554. The *en banc* majority identified no reason why a court would artificially refuse even to *consider* one side of an issue in shaping a common law remedy.

Because of its artificially one-sided approach, the court of appeals failed to consider several features strongly supporting damages relief. It did not consider the fact that the United States is legally obligated not to engage in torture, not to send a person to a country where it is more likely than not that he will be tortured, and to provide remedies for torture. CAT, Arts. 2, 3 and 14. It did not consider that the State Department has officially represented that the United States meets its obligation to provide remedies for torture by federal officials through *Bivens* actions.[10] And it failed to consider perhaps the most important factor favoring a *Bivens* action here, namely that Congress gave the courts a role to play in protecting against precisely such conduct, but defendants affirmatively obstructed Arar's access to that very mechanism. Several courts have recognized the important deterrent function that *Bivens* can play where, as here, federal officials have obstructed an individual's access to an alternative remedy. *Sonntag v. Dooley*, 650 F.2d 904 (7th Cir. 1981); *Bishop v. Tice*, 622 F.2d 349 (8th Cir. 1980); *see also*

---

[10] *See* note 1, *supra*.

Munsell v. Dep't of Agriculture, 509 F.3d 572 (D.C. Cir. 2007).

Second, and equally without precedent, the court characterized the "special factors" threshold as "remarkably low," and maintained that "whenever thoughtful discretion would pause even to consider" whether to grant a *Bivens* remedy, the courts should dismiss the claim at the threshold. App. A, 32a.. This trip-wire test creates a nearly irrebuttable presumption against relief for all constitutional violations, as there is inherent in the common law function "discretion" to "pause to consider." *Bivens, Carlson v. Green,* and *Davis v. Passman* all generated substantial dissents, so that if the test were as low as the court of appeals articulated it, those cases would not have warranted relief. *No court of appeals* has interpreted the "special factors" test to impose such an overwhelming burden.

The combination of the court of appeals' two guiding principles—taking no account of reasons *for* a *Bivens* action while giving preclusive effect to even the slightest concern *against* a *Bivens* action—virtually ensures that a *Bivens* remedy will never be recognized. As Judge Sack noted, the majority approach renders *Bivens* relief entirely "chimerical." App. A, 102a. That approach is in sharp conflict with *Bivens* jurisprudence, and warrants this Court's review.

2. The Court of Appeals Erred in Its Application of the "Special Factors" Inquiry.

The court of appeals also erred in its application of the "special factors" inquiry to the circumstances presented by petitioner's case. As a preliminary matter, it erred in treating the "context" of this action as "new." Arar sues individual federal officials for their intentional complicity in his torture. As Judge Sack correctly noted, there is nothing new about suing individual federal officials, nor about claims for abuse of persons in custody. App. A, 89a-97a. The *en banc* majority, however, erroneously treated the suit as "new" because it mischaracterized it as a broad challenge to the policy of "extraordinary rendition," App. A. 27a-28a, 35a, a policy it described as generally *not* involving intentionally subjecting an individual to torture. App. A, 8a-9a; *cf.* App. A, 28a.

While Arar's complaint cited the government's rendition policy, it plainly did so as an evidentiary fact that supported the plausibility of his allegations. App. G, 440a-441a. His *legal claim for relief* sought no remedy with respect to that policy, but merely sought remedies for a specific incident in which he was detained, denied access to court and counsel, and delivered to Syria to be tortured. The complaint requests no injunction against extraordinary rendition, nor does it require the Court to assess the validity of any other extraordinary rendition or of any general policy of rendition. Plaintiff's claim alleges only that a person detained on American soil cannot be subjected to torture. That claim is not "new."

The court's failure to treat Arar's complaint as a challenge to torture led it to surmise that the case would require inquiry into a set of questions it felt ill-equipped to answer, including:

> the perceived need for the [extraordinary rendition] policy, the threats to which it responds, the substance and sources of the intelligence used to formulate it, and the propriety of adopting specific responses to particular threats in light of apparent geopolitical circumstances and our relations with foreign countries.

App. A, 35a. But had the court treated the case as a challenge to the intentional infliction of torture, none of these questions would arise, as there are no "geopolitical circumstances" or "perceived need[s]" that could justify torture, and the government has never suggested otherwise.

It is true that the federal officials did not physically torture Arar themselves while he was in their custody on American soil. Instead, they sent him to Syria for the purpose of having him tortured there. But as Judge Sack noted, the method by which the government effectuates torture does not make a claim for torture "new." App. A, 91a-92a. Torture is forbidden under our Constitution in any circumstance.

Second, the court impermissibly treated as a "special factor" the fact that Arar's claim was brought "against senior officials" for implementing a federal "policy." App. A, 34a. To permit a damages remedy, where "in critical respects" the lawsuit is really

"against the [U.S.] government as to which the government has not waived sovereign immunity," the court reasoned, "unavoidably influences government policy," involves "an assessment of the validity and rationale of that policy and its implementation in this particular case," enmeshes government lawyers, and elicits government funds for settlement. App. A, 34-35a.

The court of appeals' reasoning conflicts with *Mitchell v. Forsyth*, 472 U.S. 511 (1985), in which this Court denied a plea by the Attorney General for absolute immunity from a *Biven's* action based on his authorization of a warrantless national security wiretap. The Court ruled that qualified immunity is sufficient to protect the ability of high level officials to implement policy. Similarly, in *Carlson*, this Court rejected an argument that special factors counseled hesitation in a suit against, among others, the Director of the Federal Bureau of Prisons, stating:

> The case involves no special factors counselling hesitation in the absence of affirmative action by Congress. Petitioners do not enjoy such independent status in our constitutional scheme as to suggest that judicially created remedies against them might be inappropriate. Moreover, even if requiring them to defend respondent's suit might inhibit their efforts to perform their official duties, the qualified immunity accorded them under *Butz* v. *Economou*, 438 U.S. 478 (1978), provides adequate protection.

Carlson, 446 U.S. at 19 (citations omitted).

The courts of appeals have also allowed *Bivens* remedies against senior government officials implementing official policy. *See, e.g.*, *Al-Kidd v. Ashcroft*, 580 F.3d 949 (9th Cir. 2009) (declining to dismiss *Bivens* action against former Attorney General for pretextual detention of suspected terrorists under material witness statute); *Magluta v. Samples*, 375 F.3d 1269 (11th Cir. 2004) (reversing dismissal of *Bivens* action against regional director of the Bureau of Prisons for punitive placement of prisoner in administrative segregation); *Trulock v. Freeh*, 275 F.3d 391 (4th Cir. 2001) *cert. denied*, 537 U.S. 1045 (2002) (reversing dismissal of *Bivens* action against Director of the F.B.I. for involvement in allegedly retaliatory search).

Where senior executive officials violate the Constitution, qualified immunity suffices to avoid improper interference with the performance of their duties. The court's treatment of this concern as a special factor compelling dismissal effectively grants federal officials the absolute immunity this Court rejected.

Third, the court reasoned that adjudicating the case would require inappropriate assessments of foreign policy and national security concerns. App. A, 33a-38a. But as noted in Point I, *supra*, Congress has expressly authorized courts to adjudicate claims that the executive is planning to send an alien to a country where he faces a risk of torture—even though such claims inevitably implicate foreign government conduct and may result in judicial determinations affecting foreign relations with which the Executive strongly disagrees. Where, as here, both Congress and the Ex-

ecutive have unequivocally condemned torture under *all* circumstances, and provided for a judicial remedy to prevent sending someone to torture, granting relief for torture would *enforce* federal foreign policy, not conflict with it. The court of appeals' contrary conclusion appears to be based on the misconception that Arar was challenging, not his subjection to torture, but a general policy of rendition that may or may not (at least in the court's view) involve the intentional infliction of torture.

Fourth, the court relied on the fact that classified information may be implicated by the suit as a reason to reject it at the threshold. App. A, 38a-39a. But as Judges Calabresi and Sack persuasively argued, given the existence of other, more finely calibrated tools to address such concerns, barring adjudication at the threshold on the basis of speculation about classified information is inappropriate. App. A, 189a-194a; App. A, 111a-120a. The court reasoned that the case may require assessment of classified information, might require some parts of the proceeding to be closed, and might cause the United States to be "graymailed" into settling to avoid disclosure of secrets that the individual defendants have no incentive to protect. App. A, 38a-46a. But courts routinely address issues of classified information; the partial closure of civil proceedings has been upheld where warranted; and the government may assert a "state secrets" privilege to protect any legitimate secrets, and therefore faces no risk of "graymail." When such tools are readily available, speculation about confidentiality concerns cannot serve to preclude *Bivens* relief at the threshold—before

the courts have even attempted to address these concerns through less draconian measures.[11]

III. The Court of Appeals' Holding that Defendants Did Not Act Under "Color of Law" of a Foreign Nation When They Conspired With Syrian Officials Conflicts With Decisions of This Court and the Eleventh Circuit.

The court of appeals also rejected petitioner's statutory claim for relief under the TVPA, which provides a cause of action for damages for individuals subjected to torture under color of law of a foreign nation. App. A, 17a-19a. The court did not dispute established precedent that the "color of law" standard is to be construed in accordance with the "color of law" requirement in 42 U.S.C. § 1983, App. A, 17a, or that liability extends not merely to those who actually carry out torture, but also to those who are complicit in torture. App. A, 18a. Yet the majority concluded that TVPA liability did not attach because the federal defendants

---

[11] The majority also found that investigating "assurances" would "potentially embarrass our government through inadvertent or deliberate disclosure of information harmful to our own and other states." App. A, 43a. These concerns are no different than others regarding classified information, and for the same reasons should not preclude a remedy at the outset. Moreover, the purported "assurances" from Syria—a country whose security services the U.S. Department of State has repeatedly determined tortures detainees during interrogation, App. G, 453a-454a, App. G., Ex. A, 480a-481a—were found to be ambiguous by the DHS OIG, which also found that the validity of the assurances was apparently not examined. OIG Report, at 5, 22. Moreover, in light of these unusual irregularities, the OIG Report explicitly declined to call what was received "diplomatic" assurances. OIG Report, at 34; App. A, 42a.

did not themselves directly "exercise[] power or authority under Syrian law." App. A, 18a-19a. This conclusion conflicts with decisions of this Court and other courts of appeals establishing that "willful participation in joint action" is sufficient to establish action under "color of law."

The federal defendants allegedly took extensive affirmative acts to ensure that Arar would be tortured under color of Syrian law. They delivered him to Syria for the purpose of having him tortured by Syrian officials, gave the Syrians a dossier on Arar and questions to ask him while he was being tortured, and obtained from the Syrians the answers extracted from Arar through torture. On these allegations, defendants willfully participated in joint action with Syrian officials, which satisfies the requirement that they subjected Arar to torture under color of Syrian law.

The majority decision requiring not "willful participation in joint action," but direct exercise of Syrian authority, conflicts with this Court's decision in *Dennis v. Sparks*, 449 U.S. 24 (1980). In *Sparks*, the Court found that private parties who bribed a judge to issue an injunction acted under color of state law. *Id.* at 27-28. The private parties did not themselves exercise state power or authority; rather, they sought to influence the judge to use his state authority to their benefit. The Court deemed it sufficient that they were "willful participant[s] in joint action." *Id.* at 27. *See also Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 296 (2001) (action "under color of law" may be found "when a private actor operates as a

'willful participant in joint activity with the State or its agents'") (internal citations omitted).[12]

The court of appeals' holding also conflicts with the Eleventh Circuit's decision in *Aldana v. Del Monte Fresh Produce*, 416 F.3d 1242 1249, 1265 (11th Cir. 2005), which held that allegations that a U.S. corporation "direct[ed] its . . . agents," including a Guatemalan mayor, "to torture the Plaintiffs" were sufficient to state a claim under the TVPA. There was no allegation that the corporation "exercised power or authority under [Guatemalan] law," as the *Arar* majority would have required. The Eleventh Circuit deemed it sufficient that the corporation allegedly participated in joint action with a foreign official.

The majority suggested that the "color of law" rule is different when defendants are federal officials rather than private parties. App. A, 19a, n.3. But "[i]t is a well-established principle. . . that federal officials are subject to section 1983 liability . . . where they have acted under color of state law, for example in conspiracy with state officials." *Hindes v. FDIC*, 137 F. 3d 148, 158 (3d Cir. 1998) (citing Third, Fifth, Sixth, Eighth, and Ninth Circuit cases). None of the decisions cited in *Hindes* required the federal official to have directly exercised power or authority under state law.

---

[12] *See also Wagenmann v. Adams*, 829 F.2d 196, 211 (1st Cir. 1987) (private actor who "exerted influence" on the police by conspiring with them to have plaintiff arrested acted under color of law); *Crowe v. County of San Diego*, __ F.3d __, 2010 U.S. App. LEXIS 894,*67-*68 (9th Cir. Jan. 14, 2010) (finding private psychologist can be liable for a conspiracy under section 1983 where he helped police "formulate a 'tactical plan' to approach the interview," which detectives "'pretty much' followed," and insofar as the tactics and questioning shock the conscience).

They focused instead on whether joint action between federal and state officials existed. In *Hampton v. Hanrahan*, 600 F.2d 600, 623 (7th Cir. 1979), *rev'd on other grounds*, 446 U.S. 754 (1980), for example, the court found that federal officials acted under color of state law when they initiated an investigation and shared information with state officials to help effectuate federal counterintelligence goals, even though there was no allegation that the federal officials were directly exercising state power or authority.[13]

The majority objected that finding federal officials liable would "render a U.S. official an official of a foreign government when she deals with that foreign state on matters involving intelligence, military, and diplomatic affairs." App. A, 19a, n.3. But holding federal officials liable under Section 1983 or the TVPA does not "render" them state officials or foreign officials, any more than holding private parties liable under Section 1983 or the TVPA makes them government employees. It simply means that where, as here, a federal official is a willful participant in joint action with an official of a foreign government to effectuate torture under foreign law, he is also liable for the wrong.

---

[13] The majority opinion also conflicts with well-established agency principles applicable to the conspiracy alleged here. "[C]onspirators are partners in crime . . . As such, the law deems them agents of one another." *Anderson v. United States*, 417 U.S. 211, 218 n.6 (1974) (citations omitted). Because federal defendants conspired with Syria to torture Arar, the law deems them agents of Syria for that purpose, and therefore to be exercising authority under Syrian law.

IV. The Dismissal of Petitioners' Access to Court Claim for Failure to Identify the Particular Defendants Responsible for Blocking his Access to Court Conflicts with Decisions of This Court and Other Courts of Appeals.

The court of appeals upheld the dismissal of Arar's *Bivens* claims for denial of access to court on the ground that his complaint failed to identify which defendants were personally involved in the actions undertaken to keep him out of court. App. A, 21a. As Judge Parker persuasively demonstrates in dissent, however, this conclusion cannot be squared with the liberal notice pleading requirements of Rule 8, and conflicts with this Court's decisions in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), and *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009). App. A, 138a-146a. As Judge Parker reasoned:

> The majority faults Arar for not pinpointing the individuals responsible for each event set out in the complaint and for failure to particularize more fully when and with whom they conspired. The irony involved in imposing on a plaintiff — who was held in solitary confinement and then imprisoned for ten months in an underground cell — a standard so self-evidently impossible to meet, appears to have been lost on the majority.

App. A, 145a-146a.

Arar did not simply allege in conclusory fashion

that he was denied access to court. Instead, he pointed to a series of specific actions undertaken by his captors which support the conclusion that defendants deliberately blocked him from seeking judicial review of his removal to Syria — denying him the right to make any phone call for the first five days of detention; repeatedly denying his requests for an attorney; hastily scheduling his "credible fear of torture" proceeding late on a Sunday night; "notifying" the attorney of the Sunday night proceeding only by leaving a message on her office voicemail that evening; lying to Arar that his attorney had chosen not to participate in the proceeding; lying to Arar's lawyer about his whereabouts when she called the next day; swiftly and covertly removing Arar under cover of darkness early the next morning; serving Arar with his "Final Notice of Inadmissibility," the prerequisite to a petition for review, as they were taking him to the plane that would deliver him to Syria; and never serving that notice on Arar's attorney or informing her that he was removed to Syria App. G, 452a-458a, 462a.

The court of appeals' conclusion that these allegations do not state a claim because Arar could not identify precisely which defendants committed each of these acts is factually and legally erroneous. Arar alleged that defendant McElroy personally left the message on the voicemail at Arar's attorney's office at a time when he knew it to be closed (Sunday evening). App. G, 456a. Most importantly, as Judge Sack underscored, the denial of access to court is alleged to be but one piece of the defendants' broader conspiracy to send Arar to Syria to be tortured, and Arar specifically alleges the defendants' personal role in that broader conspiracy. App. A, 74a,86a-88a. The removal required

the approval of defendants Blackman, who signed the "Final Notice of Inadmissibility;" Ziglar, who determined that the removal was consistent with the Convention Against Torture; and Thompson, who personally rejected Arar's designation of Canada as the country he wanted to go to, thereby paving the way for him to be sent to Syria. App. G, 446a, 458a; App. G, Ex. D, 581a-590a.[14] And as Judge Parker notes, it is highly implausible that defendants Ashcroft and Mueller were *not* involved in the extraordinary decision to send a Canadian man suspected of terrorist ties to Syria. App. A, 144a ("The inference that, in 2002, high-level officials had a role in the detention of a suspected member of al Qaeda requires little imagination.").

It is inconceivable that these defendants were specifically involved in the conspiracy to send Arar to Syria to be tortured, but were *not* involved in the inextricably interrelated conspiracy to deny him access to court in order to carry out their unlawful plan. Indeed, the *en banc* majority had "no trouble" affirming personal jurisdiction over Ashcroft, Thompson and Mueller (App. A, 6a-7a), which required finding sufficient allegations of each defendants' personal involvement

---

[14] The DHS OIG Report, issued years after Arar's complaint was filed, and based on an official internal investigation, demonstrates that further evidence regarding defendants' personal involvement was in defendants' control, and might have been disclosed through discovery. For example, Blackman directed Arar to be asked if he would agree to go to Syria. OIG Report, 11, 20. Ziglar was one of the "principal decision-makers involved in the Arar case." OIG Report at 38. Ziglar attended meetings about Arar on at least three of the days Arar was in New York, including the day he arrived, OIG Report at 11, 20, and authorized Arar's removal to Syria on October 7th. OIG Report at 30.

in Arar's mistreatment (App. B, 227a-232a; *see also* App. A, 143a; yet they simultaneously found Arar could not meet a notice pleading standard that defendants were involved in decisions to preclude him from going to court. To find implausible Arar's allegations that these defendants were involved in both his subjection to torture and denial of access to court, one would have to posit two separate conspiracies—one to send Arar to Syria and another to deny him access to courts—perpetrated by two entirely different sets of defendants.

Moreover, it is certainly a reasonable expectation that discovery would reveal evidence supporting defendants' personal involvement in the denial of Arar's access to court, given the complaint's allegations that the defendants were involved in his unlawful removal to Syria. *See Twombly*, 550 U.S. at 556 (requiring simply "enough fact to raise a reasonable expectation that discovery will reveal evidence" supporting the claims). Unlike *Iqbal*, where an "obvious alternative explanation" for the facts asserted rendered the plaintiff's conclusory allegation that Ashcroft had conspired to detain individuals on the basis of race and ethnicity, 129 S. Ct. at 1951-52, here there is simply no plausible alternative explanation for denying Arar contact with a lawyer, hastily holding a proceeding late on a Sunday night the day after Arar first met with his lawyer, lying to the lawyer the next day, and then serving Arar (not his lawyer) with his notice of inadmissibility only as he is being taken, shackled, to the plane that would bring him to Syria. Indeed, defendants never even *attempted* to advance an alternative explanation. The only plausible explanation for the facts asserted in Arar's complaint is that, having conspired to send a

man to Syria because that government used torture as an interrogation method, defendants also had to deny Arar access to the judicial review that would have exposed and frustrated their plan.

Accordingly, the majority erred in upholding the dismissal of Arar's denial of access to court claim, applying an impossible-to-satisfy pleading requirement in conflict with this Court's decisions in *Twombly* and *Iqbal*. *See Braden v. Wal-Mart Stores, Inc.*, 588 F.3d 585, 597 (8th Cir. 2009) (holding that district court violated fundamental tenet that inferences are to be drawn in favor of the non-moving party on motions to dismiss, and distinguishing *Iqbal* because in that case there was an "obvious alternative explanation" for the defendants' conduct, requiring Iqbal to plead facts that would rule out this alternative); *Brooks v. Ross*, 578 F.3d 574, 581 (7th Cir. 2009) (noting importance of liberal notice pleading).

CONCLUSION

For all of the above reasons, the Court should grant the petition for a writ of certiorari.

Dated: February 1, 2010

Respectfully submitted,

DAVID D. COLE
c/o Georgetown Univ.
Law Center
600 New Jersey Ave. NW
Washington, DC 20001
(202) 662-9078

MARIA C. LAHOOD
Counsel of Record
JULES LOBEL
KATHERINE GALLAGHER
Center for Constitutional
Rights
666 Broadway, 7th floor
New York, NY 10012
(212) 614-6430
mlahood@ccrjustice.org

Counsel for Petitioner
Maher Arar